Supreme Court, U.S.
FILED
991388 FEB 17 2000
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

PHELPS DODGE CORPORATION, ARIZONA PUBLIC SERVICE COMPANY, GILA VALLEY IRRIGATION DISTRICT, AND FRANKLIN IRRIGATION DISTRICT,

Petitioners,

v.

THE UNITED STATES, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Arizona

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1908 this Court established the federal implied reservation of water rights doctrine. This doctrine holds that when federal lands are reserved from the public domain for a specific purpose, a sufficient quantity of surface water is impliedly reserved for those lands to satisfy the primary purpose of the reservation. This doctrine has been applied to both Indian reservations and non-Indian federal reservations such as national parks and forests. However, this Court has never applied the doctrine of implied reservation of water rights to groundwater. In November, 1999, the Supreme Court of the State of Arizona held that the doctrine does extend to groundwater. In doing so, the court elected to create a new federal common law rule of decision for determining the nature of federal rights to groundwater. The court created new federal common law despite the existence of nondiscriminatory state law that provides all landowners in the State of Arizona, including federal reservations, equal access and rights to groundwater. This case therefore presents the following question:

> May a state court create federal common law to govern a federal reservation's groundwater rights where nondiscriminatory state law already provides a rule of decision giving all landowners in the State equal rights to groundwater?

PARTIES TO THE PROCEEDINGS

Petitioners are Phelps Dodge Corporation, a Delaware corporation, Arizona Public Service Company, an Arizona corporation, and Gila Valley Irrigation District and Franklin Irrigation District, both of which are irrigation districts organized according to the laws of Arizona. Each of the petitioners has filed one or more Statements of Claimant in the underlying proceeding before the Superior Court of the State of Arizona, In and For the County of Maricopa, for adjudication of rights to waters in the Gila River System and Source in Arizona. Each of the petitioners also engages in operations or activities within the State of Arizona that depend upon the use of groundwater.

Respondents are all other parties to the appeal below before the Supreme Court of the State of Arizona, case numbers WC-90-0001-IR through WC-90-0007-IR (consolidated) and WC-79-0001 through WC-79-0004 (consolidated) from which this petition arises.* The Respondents are:

United States of America
Gila River Indian Community
Hopi Tribe

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* The following entities listed as parties to the appeal below before the Supreme Court of the State of Arizona are not considered Respondents because they or their successors are, in their current corporate status, corporately related to Petitioner Phelps Dodge Corporation: Cyprus Christmas Mine Corporation; Cyprus Miami Mining Corporation; Cyprus Pima Mining Corporation; Cyprus Sierrita Corporation; and Cyprus Twin Buttes Corporation.

PARTIES TO THE PROCEEDINGS – Continued

Navajo Nation
San Carlos Apache Tribe
San Juan Southern Paiute Tribe
Tonto Apache Tribe
Yavapai Apache Indian Tribe, Camp Verde Reservation
State of Arizona
State of Arizona Department of Water Resources
Pima County, Arizona
City of Benson, Arizona
City of Chandler, Arizona
City of Flagstaff, Arizona
City of Glendale, Arizona
City of Globe, Arizona
City of Mesa, Arizona
City of Phoenix, Arizona
City of St. Johns, Arizona
City of Scottsdale, Arizona
City of Sierra Vista, Arizona
City of Tempe, Arizona
City of Tucson, Arizona
Town of Gilbert, Arizona
Town of Mammoth, Arizona
Town of Patagonia, Arizona
Apache Nitrogen Products, Inc.
Arlington Canal Company
Arizona Rock Products Association
ASARCO Inc.
Aztec Land and Cattle Company, Limited
Bella Vista Ranches Limited Partnership
Bella Vista Water Company, Inc.
Buckeye Irrigation Company
Buckeye Water Conservation and Drainage District
Central Arizona Irrigation and Drainage District
Concho Water Company
Cortaro-Marana Irrigation District

PARTIES TO THE PROCEEDINGS – Continued

Cortaro Water Users' Association
Escudilla Cattle Company
Members of and Gila Bend-Dendora Valley Water Users Association
Silas Kisto
Wayne D. Klump
J.D. & Maxine Leverton
Leverton Family Trust
Leverton Investments
Little Colorado Association
Magma Copper Company (now BHP Copper)
Maricopa-Stansfield Irrigation and Drainage District
New Magma Irrigation and Drainage District
Pinetop Woodland Irrigation Company
Earl Platt
Ponderosa Domestic Water Improvement District
Rigby Water Company
Rio Rico Properties, Inc.
Rocking Chair Ranch
Roosevelt Irrigation District
Roosevelt Water Conservation District
St. Johns Irrigation and Ditch Company
Salt River Project Agricultural Improvement & Power District
Salt River Valley Water Users' Association
Seven Springs Ranch
Stone Container Corporation (now Abitibi Consolidated Sales Corporation)
Tenneco Arizona Properties Corporation
Tenneco West, Inc.
Valencia Water Company, Inc.
Ray Wrobley, Charles Onion, John Kovavich, Dennis Weckerly – officers and directors of Verde Valley Water Users, Inc.
Woodland Irrigation Company

PARTIES TO THE PROCEEDINGS – Continued

Each of the foregoing is a claimant in the adjudication below in the Maricopa County Superior Court concerning water rights in the Gila River System and Source, or in a second general stream adjudication pending in the Superior Court of the State of Arizona, In and For the County of Apache, No. 6417, concerning water rights in the Little Colorado River System and Source. Each of these parties properly appeared pursuant to the Orders Concerning Petitions for Interlocutory Review (filed December 11, 1990) of the Supreme Court of the State of Arizona as a party to the appeal from which this petition for writ of certiorari arises. Thousands of additional parties have filed Statements of Claimant in the underlying adjudication before the Maricopa County Superior Court, but did not appear as parties in the appeal from which this petition arises. Therefore, these additional claimants are not considered Respondents to this petition pursuant to the Rules of the Supreme Court of the United States.

CORPORATE DISCLOSURE

Pursuant to Rule 29(6), Rules of the Supreme Court of the United States, the Petitioners disclose that Petitioner Phelps Dodge Corporation has no parent corporations and that no publicly held corporations own 10 percent or more of the stock of Petitioner Phelps Dodge Corporation. The parent corporation for Petitioner Arizona Public Service Company is Pinnacle West Capital Corporation, and no other publicly held corporations own 10 percent or more of the stock of Petitioner Arizona

PARTIES TO THE PROCEEDINGS – Continued

Public Service Company. The remaining Petitioners, Gila Valley Irrigation District and Franklin Irrigation District, are irrigation districts organized pursuant to Arizona law and therefore have no parent corporations.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Phelps Dodge Corporation, Arizona Public Service Company, Gila Valley Irrigation District, and Franklin Irrigation District, respectfully request that a writ of certiorari issue to review that portion of the November 19, 1999 opinion of the Supreme Court of the State of Arizona addressing the question of federal reserved rights to groundwater (identified by the court below as "Issue 4").

OPINIONS BELOW

The opinion of the Supreme Court of the State of Arizona is reported at 989 P.2d 739 (Ariz. 1999), and is reprinted in Appendix A. The Supreme Court of Arizona's Orders Concerning Petitions for Interlocutory Review, dated September 11, 1990, are unpublished and are reprinted in Appendix B. The Special Procedural Order Providing for Interlocutory Appeals and Certifications adopted by the Supreme Court of the State of Arizona on September 26, 1989 is unpublished and is reprinted in Appendix C. The relevant orders of the Maricopa County Superior Court are unpublished and are reprinted in Appendices D through F.

JURISDICTION

The Supreme Court of Arizona issued its opinion in this case on November 19, 1999. No motion for reconsideration was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

1. The McCarran Amendment, 66 Stat. 560, 43 U.S.C. § 666, provides, in relevant part:

> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances. . . .

2. Arizona Revised Statutes (A.R.S.), § 45-141.A provides, in relevant part, that "[t]he waters of all sources, flowing in streams, canyons, ravines or other natural channels, or in definite underground channels . . . and of lakes, ponds and springs on the surface, belong to the public and are subject to appropriation and beneficial use. . . . "

3. A.R.S. § 45-453 provides, in relevant part, that "[i]n areas outside of active management areas, a person may . . . [w]ithdraw and use groundwater for reasonable and beneficial use. . . . "

STATEMENT OF THE CASE

A. Procedural History of the Question Presented.

This case is a general adjudication of all rights to use water in the Gila River System and Source in the State of Arizona. It was initiated in 1974 by the filing of a petition to adjudicate conflicting claims to water rights in a portion of the Gila River Basin. *See United States v. Superior Court*, 697 P.2d 658, 663 (Ariz. 1985). Additional petitions were subsequently filed for other portions of the basin, and these several actions were consolidated by the Supreme Court of Arizona into a single, comprehensive general stream adjudication. *Id.* at 664. As a general adjudication, this case affects the water rights of all claimants, including federal claimants, who assert a right to use any water subject to the jurisdiction of the court within the geographic boundaries of the Gila River Basin. Furthermore, because "[w]ater usage in Arizona exceeds available surface supply," *id.* at 663, the claims of any one party to the adjudication, including claims asserted by Indian tribes and the federal government, will " 'inescapably vie with other public and private claims for the limited quantities to be found in the rivers and streams' " of Arizona. *Id., quoting United States v. New Mexico*, 438 U.S. 696, 699 (1978).

The Gila River Basin encompasses approximately 47% of the land in Arizona. The waters of the Basin are used by millions of Arizonans for municipal, agricultural, industrial, recreational and other purposes. Approximately 85% of the state's population resides in the Basin. J. Folk-Williams, *The Gila Basin and the Waters of Southern Arizona*, p. 4 (1991). However, the surface waters in the Gila River System supply only one fourth of the Basin's

water requirements. *Id.* The balance is met either with Colorado River water imported through the Central Arizona Project, or by groundwater pumped from the large regional aquifers that underlie most of the land in the Basin. *Id.*

As will be discussed in greater detail below, Arizona law establishes a bifurcated system of water rights under which surface water and the "subflow" of surface streams are subject to the doctrine of prior appropriation, while "percolating" groundwater is not subject to appropriation. Instead, percolating groundwater is subject to the doctrine of reasonable use, under which all landowners have an equal right to use groundwater underlying their lands for any reasonable purpose on the land from which it is withdrawn. Nevertheless, because of uncertainties associated with the extent to which underground water is subject to appropriation,[1] as well as the nature of federal rights to groundwater, thousands of parties who assert only a right to pump groundwater under state law have remained parties to the Gila River Adjudication.

Because every claimant is, to one extent or another, adverse to all other claimants, the Gila River Adjudication is a lawsuit of nearly unrivaled scope, complexity and duration. In the late 1970s and early 1980s, more than

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[1] *See In re the General Adjudication of All Rights to Use Water in the Gila River System and Source (Gila River II)*, 857 P.2d 1236 (Ariz. 1993). After issuance of the supreme court's opinion in *Gila River II*, the trial court conducted further proceedings on this subject. In 1994, the superior court issued a second ruling that has also been appealed to the Supreme Court of Arizona. Oral argument was presented to the supreme court on December 7, 1999, but no decision has been rendered to date.

849,000 summonses were sent to potential claimants notifying them of the pendency of the case and the procedure for submitting their water rights claims to the court. *See In the Matter of the Rights to the Use of the Gila River (Gila River I)*, 830 P.2d 442, 446 (Ariz. 1992). Those persons to whom summonses were sent included virtually all landowners within the geographic boundaries of the Gila River Basin, as well as "federal, state and local governments and agencies, Native American communities, and irrigation districts within the watersheds" and "all well owners of record and all known holders of water rights within the watersheds. . . . " *Id.* In response, more than 66,000 separate "Statements of Claimant" were filed by more than 24,000 claimants, including individuals, municipalities, corporations, irrigation districts, state and federal governmental agencies, and numerous Indian tribes with reservations located in the Gila River Basin. As a result, this case is one of the largest legal proceedings ever adjudicated in the United States.

The magnitude of this case and the significance of the issues it raises have resulted in many years of litigation without any final adjudication of specific water rights.[2] In the first half of the 1980s, both this Court and the Supreme Court of Arizona considered the jurisdiction of

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[2] While there has been no final determination of water rights through litigation, there have been four settlements approved by the Gila Adjudication court that resolve some or all of the claims of specific Indian tribes within the basin. Those tribes are the Salt River Pima-Maricopa Indian Community, the Fort McDowell Indian Community, the Yavapai-Prescott Indian Tribe and the San Carlos Apache Tribe (partial settlement).

the Arizona state courts to adjudicate water rights of Indian tribes. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983); *United States v. Superior Court*, 697 P.2d 658 (Ariz. 1985). In *San Carlos Apache Tribe*, this Court noted "the important federal interest in allowing all water rights on a river system to be adjudicated in a single comprehensive state proceeding," *San Carlos Apache Tribe*, 463 U.S. at 551, and held that the water rights claims of Indian tribes can be subject to state court jurisdiction pursuant to the McCarran Amendment, even in states admitted to the Union under congressional enabling acts that required the state to disclaim any interest in Indian lands. *Id.* at 564. The Supreme Court of Arizona later concluded that the state courts have jurisdiction to consider Indian water rights claims under the nearly identical disclaimer language found in the Arizona Constitution. *United States v. Superior Court*, 697 P.2d at 670.

B. Superior Court Proceedings Below.

After resolution of these threshold jurisdictional issues, the Maricopa County Superior Court began prioritizing and managing the thousands of claims in the Gila Adjudication. The court issued comprehensive case management orders and convened frequent status conferences intended to identify and address important legal issues requiring early attention by the court. During this process of framing the issues that would determine the future course of the adjudication, several parties filed a motion for summary judgment to "exclude from the adjudication all wells which are pumping 'percolating groundwater.' " Order dated September 9, 1988, at App. D2. In considering the issues raised in the motion, the court determined,

sua sponte, that it would be "appropriate to expand the citie's [sic] motion to the entire issue of the Ground Water and Surface Water Relationship, including whether or not the 'Winters Doctrine' applies to ground water."[3] Minute Entry, November 20, 1987, at App. F3.

In a subsequent minute entry, the court identified a total of eight issues it intended to resolve concerning the interrelationship between groundwater and surface water. Among these issues, the court identified the question: "Does the 'Winters' Doctrine of Federal Reserved Rights apply to percolating ground water under and/or outside of a federal reservation, how does it apply and does it apply only to the reduction of surface water resources and/or groundwater resources beneath the federal reservation?" Minute Entry dated January 19, 1988, at App. E3.

After these questions were briefed and argued, the court issued its September 9, 1988 Order, ruling on each of the eight issues identified in its prior minute entry. On the question of whether the *Winters* Doctrine applies to percolating groundwater, the court ruled that "federal reserved water rights *apply to both surface water and groundwater sources on and off the reservation* whose diversion affects reservation sources to the extent that there is not enough water left to satisfy the reservation's purpose, or P.I.A. [Practicably Irrigable Acreage] if the land is an Indian reservation." App. D23 (emphasis added). Thus, the superior court ruled, without reference to any specific

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[3] The "Winters Doctrine" is the name frequently applied to the federal implied reservation of water rights doctrine. It stems from the first case in which this Court recognized the doctrine, *Winters v. United States*, 207 U.S. 564 (1908).

federal reservation, that the doctrine of implied reservation of water rights extends to groundwater, both on and off a reservation.

C. Proceedings Before the Supreme Court of Arizona.

On September 26, 1989, the Supreme Court of Arizona adopted its Special Procedural Order Providing for Interlocutory Appeals and Certifications ("Special Procedural Order"). *See* App. C. The court made this order specifically applicable to appeals of "any ruling of the superior court" in the Gila River Adjudication. App. C1. The text of the Special Procedural Order explains the court's purpose in issuing the order:

> The purpose of this order is to establish a procedure for early review of all substantial questions in this general adjudication of water rights. Early appellate review may avoid wasteful trial court proceedings, may result in substantial savings of time or expense, or may for other reasons be in the interests of justice.

App. C8.

After issuance of the Special Procedural Order, numerous parties petitioned the Supreme Court of Arizona for review of various aspects of the superior court's September 9, 1988 Order. On September 11, 1990, the Supreme Court of Arizona granted review of six specific issues that it "reformulated" from among the many petitions filed regarding the superior court's order. *See* Orders Concerning Petitions for Interlocutory Review, App. B. Two of these six issues were the subject of the November 19, 1999 opinion (the "Opinion Below") that has prompted the filing of this Petition. These issues, the fourth and fifth identified by the court, were stated as:

4. Is non-appropriable groundwater subject to federal reserved rights?

5. Do federal reserved rights holders enjoy greater protection from groundwater pumping than holders of state law rights?

Orders Concerning Petitions for Interlocutory Review, App. B3.[4]

The Supreme Court of Arizona answered both questions in the affirmative. Opinion Below, ¶ 43 (App. A30). In doing so, the court expressly rejected the application of existing state groundwater law as its rule of decision for determining the scope of federal rights to groundwater. Opinion Below, ¶ 25 (App. A21-A22).

Because the Supreme Court of Arizona's rejection of state law as the governing rule of decision conflicts with the prior decisions of this Court, will be gravely disruptive to the citizens of the State of Arizona, and has serious implications for water users throughout the western United States (and indeed throughout the Nation), Petitioners pray for the issuance of a writ of certiorari to review the judgment of the court below.

D. Finality of the Opinion Below.

The Supreme Court of Arizona's judgment on Issue 4, although interlocutory, is final for purposes of this Court's jurisdiction under 28 U.S.C. § 1257(a). Review of the question presented in this Petition at this time is consistent with the prior decisions of this Court on the

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[4] Although the Supreme Court of Arizona decided Issues 4 and 5 together in the Opinion Below, Petitioners seek review of only Issue 4 at this time.

issue of finality of judgments. Specifically, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court recognized "at least four categories" of cases in which it accepted jurisdiction under circumstances where "the highest court of a State has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come. . . . " *Id.* at 477. In these cases, this Court "has treated the decision on the federal issue as a final judgment for purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Id.* Given the nature of the Gila River Adjudication, the federal issues finally decided by the Supreme Court of Arizona in the Opinion Below satisfy this Court's standards of finality and justify review at this time.

The fourth category of cases identified in *Cox Broadcasting* most directly addresses the circumstances presented in this Petition. In such cases, "if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." *Id.* at 482-83.

On the question presented to the Court in this Petition, a refusal immediately to review the Opinion Below will seriously erode at least three important federal policies.[5] The first of these policies is found in the *Winters* Doctrine itself, which is based on a reservation-specific analysis of the purpose for which particular lands were

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[5] Each of these policies will be discussed in greater detail below under the heading "Reasons for Granting the Petition."

reserved. The Opinion Below is inconsistent with this policy because the Supreme Court of Arizona created a new federal reserved right to groundwater without considering the purposes of any specific reservation. The second policy impacted by the Opinion Below is the long-standing recognition, both by this Court and by Congress, of the need to integrate, to the greatest extent possible, the water rights claims of federal reservations within existing state-law based systems of water rights. Finally, the third federal policy impacted by the Opinion Below is this Court's repeated admonition that, with few exceptions, nondiscriminatory state law, rather than federal common law, should be adopted as the rule of decision for determining rights under federal law. All of these policies are frustrated by the Opinion Below.

Cox Broadcasting identifies *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963), as exemplifying the fourth category of interlocutory decisions that satisfy the finality requirement. In *Langdeau*, this Court reviewed an interlocutory decision of the Supreme Court of Texas on the applicability of a federal venue statute. In deciding to exercise its jurisdiction, this Court stated:

> [W]e believe that it serves the policy underlying the requirement of finality in 28 U.S.C. § 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings.

Id. at 558.

Similarly, review at this time of the question presented in this Petition would serve the policy underlying the finality requirement by clarifying the legal standards by which federal rights to groundwater are to be determined. Furthermore, unless the erroneous conclusions of the Supreme Court of Arizona are reversed at this time, thousands of claimants in the Gila River Adjudication will be forced to endure "long and complex litigation which may all be for naught" if consideration of the question of federal reserved rights to groundwater "is postponed until the conclusion of the proceedings." *Id.* Given the scope of this case and the importance of the question presented here, this burden would be imposed on thousands of claimants for many years to come.[6]

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[6] The Supreme Court of Arizona foresaw the need for timely review by this Court of at least some issues to be considered under the Special Procedural Order. In *Gila I*, the court explained:

> The Special Procedural Order was promulgated to provide a mechanism to review the important legal decisions of the trial court as promptly as practicable at the outset of the adjudication. *In a case of this magnitude, which is expected to continue for at least three or four decades,* it is imperative that any significant error be corrected immediately to avoid conducting forty years of litigation only to discover the need to begin anew.
>
> . . .
>
> In certain circumstances, such interlocutory decisions are reviewable by the United States Supreme Court. *See Cox Broadcasting v. Cohn.*

Gila I, 830 P.2d at 445, n. 2 (emphasis added). This language is equally persuasive here and counsels in favor of this Court exercising its jurisdiction under 28 U.S.C. § 1257(a) at this time.

Finally, this Court also has recognized that, given the "virtually unique" nature of water rights adjudications, *San Carlos Apache Tribe*, 463 U.S. at 571, interlocutory review of federal reserved water rights claims asserted in ongoing state court proceedings may be necessary. On at least two occasions, this Court has issued writs of certiorari to review the interlocutory decisions of state supreme courts regarding the nature or extent of specific federal reserved water rights. *See Wyoming v. United States*, 488 U.S. 1040 (1989), *affirmed without opinion*, 492 U.S. 406 (1989); *New Mexico*, 438 U.S. 696. Because issues of equal significance and urgency are raised in this Petition, the Opinion Below should be considered final for purposes of this Court's jurisdiction under 28 U.S.C. § 1257(a).

REASONS FOR GRANTING THE PETITION

This Petition should be granted, and a writ of certiorari issued, for two principal reasons. First, the Supreme Court of Arizona "has decided an important question of federal law that has not been, but should be, settled by this Court," and it has done so in a way that "conflicts with relevant decisions of this Court." Rule 10(c), Rules of the Supreme Court of the United States. The federal question presented here is vitally important because the Opinion Below has serious implications for not only millions of Arizona citizens, but also for groundwater-dependent communities throughout the United States. Second, the Opinion Below decided this important question of federal law in a way that "conflicts with the decision of another state court of last resort. . . . " Rule 10(b), Rules of the Supreme Court of the United States.

I. The Supreme Court of Arizona's Decision Frustrates Clear Federal Policies and Conflicts with Controlling Decisions of this Court.

A. The Opinion Below Conflicts with this Court's *Winters* Doctrine by Finding a Federal Reserved Right to Groundwater Without Considering the Purposes of Any Specific Reservation.

The nature and extent of reserved water rights associated with federal reservations is undeniably a question of federal law. *See, e.g., San Carlos Apache Tribe*, 463 U.S. at 571, *Cappaert v. United States*, 426 U.S. 128, 145 (1976). However, the *Winters* Doctrine is simply a rule of construction founded on a particularized scrutiny of the congressional enactments, Executive Orders, treaties or agreements that established particular federal reservations. The Doctrine does not authorize recognition of reserved water rights in the absence of a reservation-specific showing of the purpose for which each reservation was set aside.

Nevertheless, the Supreme Court of Arizona held, without reference to any specific Act of Congress, Executive Order or treaty establishing a federal reservation in the State of Arizona, that "[f]ederal reserved rights extend to groundwater to the extent groundwater is necessary to accomplish the purpose of a reservation." Opinion Below, ¶ 43 (App. A, p. 30). Because this holding was rendered "in the abstract," *id.*, ¶ 31 (App. A, p. 24), and without aid of a record establishing the purposes of any federal reservation, it is directly contrary to this Court's prior decisions regarding federal reserved rights.

In each of the cases where this Court has recognized reserved water rights for specific federal reservations, it has done so only after careful review of the underlying

legal instruments by which the reservation in question was created. *See New Mexico*, 438 U.S. at 700-702; *Cappaert*, 426 U.S. at 131-132, 139-141; *Arizona v. California*, 373 U.S. 546, 597 (1963); *United States v. Powers*, 305 U.S. 527, 532-33 (1939); *Winters*, 207 U.S. at 575-76 (1908). Thus, reserved rights to surface water have been found to exist only by virtue of the specific intentions of Congress or the executive branch when particular federal lands are reserved. For example, in *Winters* the Court held that the existence of any reserved water rights "turns on the agreement of May, 1888, resulting in the creation of the Fort Belknap Reservation," and the Court's "construction of this agreement." 207 U.S. at 575-76. Similarly, in *Arizona v. California*, the Court noted that Indian reserved right claims "are governed by the statutes and Executive Orders creating the reservations." 373 U.S. at 597. In *Cappaert*, the Court engaged in detailed scrutiny of the Executive Order establishing Devil's Hole National Monument to determine whether there was an "inferred" federal intent to reserve water for Devil's Hole. 426 U.S. at 131-132, 139-141. In *New Mexico*, the Court noted that "careful examination is required" of "both the asserted water right and the specific purposes for which the land was reserved. . . . both because the reservation [of water] is implied, rather than expressed, and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water." 438 U.S. at 700-702.

These cases confirm that courts must ascertain the federal purpose for which a reservation was created, and only then determine whether a reserved right exists. The Opinion Below omitted this required step and announced

a new federal common law rule recognizing a reserved right to groundwater without reference to the federal purpose behind creation of any specific reservation. The Opinion Below should be reversed on this basis alone.

B. The Opinion Below Fails to Integrate Federal Groundwater Rights with Existing State Groundwater Law.

Even in cases where reserved water rights might be expressed or implied for a particular reservation, those rights must still be integrated, to the maximum possible extent, within the existing state law-based system of water rights prevailing in the state in question. With regard to surface waters, for instance, *Cappaert* instructs that when the federal government reserves land for a specific federal purpose, "by implication, [it] reserves *appurtenant water then unappropriated* to the extent needed to accomplish the purpose of the reservation. In so doing, the United States acquires *a reserved right in unappropriated water* which vests on the date of the reservation and is *superior to the rights of future appropriators.*" 426 U.S. at 138 (emphasis added). Thus, the rule of construction recognizing federal reserved rights has consistently limited those rights to "unappropriated water" available on the date the reservation is created, and makes such rights superior only in relation to "future appropriators."

While *Cappaert* held that the federal government could enjoin uses of groundwater or surface water by *future* appropriators that interfere with the *prior* federal right to surface water, no case has ever suggested that federal reserved rights are superior to water rights existing under state law on the date the federal reservation was created. Indeed, rather than ensuring that the federal

right will be *first* in line for water, the *Winters* Doctrine merely ensures that the reserved land will have a *place* in line. Quite simply, the *Winters* Doctrine is not a guarantee of water, but only a rule of construction under which federal water rights are to be integrated into existing state law-based systems of water rights.

However, the Opinion Below explicitly rejects the application of Arizona groundwater law in determining the nature of federal rights to groundwater. Opinion Below, ¶ 25 (App. A20-A21). By doing so, the Supreme Court of Arizona has extended the *Winters* Doctrine in a manner that seeks to *guarantee* a supply of water to federal reservations, rather than simply provide those reservations with a nondiscriminatory right of access to a shared resource. This extension of the *Winters* Doctrine must stand, if at all, on heretofore unrecognized principles of general federal common law. These newfound principles were adopted without regard for the potential impact on state law-based groundwater rights, and without any attempt to logically integrate the disparate federal and state-law rights. By its actions, the Supreme Court of Arizona has ignored the prior decisions of this Court, and for this additional reason the Opinion Below should be reversed.

C. The Opinion Below Rejects State Law as a Rule of Decision and Therefore Conflicts with *Kimbell Foods* and *Wilson*.

It has long been an established principle that "[t]here is no federal general common law." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Moreover, as this Court has repeatedly noted, even in situations where "federal law ultimately controls the issue . . . it is still true that

'[c]ontroversies . . . governed by federal law, do not inevitably require resort to uniform federal rules . . . Whether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy. . . . ' " *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 671-72 (1979), *quoting United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979).

Consistent with these principles, this Court has established a three part test for determining when it is appropriate to adopt a uniform nationwide federal rule or, instead, to rely on applicable state law as the rule of decision for determining the scope of a federal right or statute. Given the fact that no prior decision of this Court has recognized a reserved right to groundwater, and in light of the Supreme Court of Arizona's unprecedented expansion of the *Winters* Doctrine, its decision to recognize a new federal right immune from otherwise relevant, nondiscriminatory state law must be measured against this test. As articulated in *Kimbell Foods*, the test requires a consideration of:

1. Whether there is a "need for a nationally uniform body of law." If there is no such need, "state law may be incorporated as the federal rule of decision."
2. Whether "application of state law would frustrate specific objectives of . . . federal programs;" and
3. "[T]he extent to which application of a federal rule would disrupt commercial relationships predicated on state law."

Kimbell Foods, 440 U.S. at 728-29. Other decisions of this Court have confirmed that the situations in which it is appropriate to adopt a "special federal rule" are:

> "few and restricted," limited to situations where there is a "significant conflict between some federal policy or interest and the use of state law." Our cases uniformly require the existence

> of such a conflict as a precondition for recognition of a federal rule of decision. Not only the permissibility but also the scope of judicial displacement of state rules turns upon such a conflict.

O'Melveny & Myers v. FDIC, 512 U.S. 79, 87 (1994) (citations omitted).

In *Wilson*, this Court applied the *Kimbell Foods* test to a federal question very similar to the question at issue in this Petition. Specifically, in *Wilson*, the Court considered the applicability of state law as a rule of decision for determining whether the Omaha Indian Tribe retained ownership of a portion of its reservation that had been physically separated from the remainder of the reservation by the shifting channel of the Missouri River. *Wilson*, 442 U.S. at 656-57. The question turned on the doctrines of accretion and avulsion, and the answer depended on whether Nebraska law would be incorporated as the rule of decision or, instead, a special federal rule would be created. *Id.* at 658.

Applying the first element of the *Kimbell Foods* test, the Court concluded that:

> [W]e perceive no need for a uniform national rule to determine whether changes in the course of a river affecting riparian land owned or possessed by the United States or by an Indian tribe have been avulsive or accretive. For this purpose, *we see little reason why federal interests should not be treated under the same rules of property that apply to private persons holding property in the same area by virtue of state, rather than federal, law.* It is true that [State laws] may differ . . . but *as long as the applicable standard is applied even-handedly to particular disputes,* we discern no imperative need to develop a general body of

> federal common law to decide cases such as this. . . .

Wilson, 442 U.S. at 673 (emphasis added). This conclusion applies with equal force to the issue raised in this Petition. If rules affecting ownership of land by the federal government and Indian tribes are to be discerned from applicable state law, then certainly the rules affecting the water rights of those lands also should be discerned by reference to state law. As long as that law is "applied even-handedly to particular disputes," *id.*, there is no reason to depart from it in favor of a federal common law rule. As discussed below, Arizona groundwater law does apply even-handedly to both federal and non-federal landowners. Therefore, it should have been adopted as the rule of decision for determining the nature of federal rights to groundwater in Arizona.

On the second element of the *Kimbell Foods* test, *Wilson* noted that "given equitable application of state law, there is little likelihood of injury to federal trust responsibilities or to tribal possessory interests." *Id.* Thus, the Court concluded that application of state law on a question involving title to Indian property would not frustrate the specific objectives of any federal program.

This conclusion also applies with equal, if not greater, force to the issue raised in this Petition. Both this Court and Congress have repeatedly and clearly indicated not only the desirability but the need for integration of federal claims into a single, coherent system of water rights.[7] In *Colorado River Water Conservation Dist. v.*

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[7] *See San Carlos Apache Tribe*, 463 U.S. at 551; *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976); *United States v. District Court for Eagle County*, 401 U.S. 520, 525

United States, the Court particularly noted its concern with "avoiding the generation of additional litigation through permitting *inconsistent dispositions of property*. This concern is heightened with respect to water rights, the relationships among which are highly interdependent." *Id.*, 424 U.S. at 819 (emphasis added). Rather than avoiding "inconsistent dispositions of property" and additional litigation, the Opinion Below would create two inconsistent rules governing the use of groundwater in Arizona. These rules would apply unequally to a common resource shared by neighboring landowners – obviously a situation at odds with longstanding federal policy favoring integration of federal water rights within existing state water law systems. Only if Arizona groundwater law is adopted as the rule of decision for federal rights (thus giving both federal and non-federal claimants equal access to and rights in groundwater), will federal policy in this arena be advanced.

As for the third element of the *Kimbell Foods* test, *Wilson* concludes:

> Private landowners rely on state real property law when purchasing real property. . . . There is considerable merit in not having the reasonable expectations of these private landowners upset by the vagaries of being located adjacent to or across from Indian reservations or other property in which the United States has a substantial interest. Borrowing state law will also avoid arriving at one answer . . . in disputes involving Indians on one side and possibly quite different

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(1971); McCarran Amendment, *quoted in* "Statutory Provisions Involved," *supra*.

> answers with respect to neighboring land where non-Indians are the disputants.

Wilson, 442 U.S. at 674.

Precisely this same reasoning supports incorporation of state law as the rule of decision to determine the nature of federal rights to groundwater in Arizona. To do so would avoid upsetting the reasonable expectations of millions of Arizonans who are dependent on groundwater, or subjecting them to the vagaries of being located adjacent to or near Indian or other federal reservations. It would also avoid having the answer to the question of what groundwater rights are held by a landowner depend on whether that landowner is the federal government, an Indian tribe, or a non-federal party. Only by applying Arizona groundwater law as the rule of decision can such arbitrary results be avoided.

When the elements of the *Kimbell Foods* test are applied here as they were in *Wilson*, the inescapable conclusion is that state law should have been adopted by the Supreme Court of Arizona in determining the nature of federal rights to groundwater. However, with only passing reference to *Kimbell Foods* (*see* Opinion Below, ¶ 25 [App. A21]) and *Wilson* (*id.*, ¶ 28 [App. A22]), the court rejected state law as its rule of decision in favor of its own concept of the nature of federal rights to groundwater. Because the Opinion Below is contrary to the *Kimbell Foods* test, it should be reversed by this Court.

II. This Issue is Crucial to Millions of Arizona Citizens as Well as the Citizens of Many Other States.

The question presented in this Petition is not simply an academic debate. To the contrary, this issue is of vital importance to the vast majority of the citizens of Arizona

who are dependent, in whole or in part, on groundwater, and who may be affected by the groundwater claims of one or more of the dozens of large federal reservations located throughout the state. Federal lands, including both Indian and non-Indian federal reservations, encompass approximately 71% of the state of Arizona. *See* Univ. of Ariz., *Arizona Statistical Abstract*, pp. 174-77 (1993). In contrast, only 17% of the state is in private ownership. *Id.*[8] Yet the vast majority of the state's population resides on this limited private land base. The water supplies of the Gila River Basin are a common resource that must be shared by both federal and non-federal claimants.[9]

The Opinion Below, by sanctioning a new federal groundwater right inconsistent with the state law rights exercised by most of the citizens of the state, will foster confrontation rather than cooperative sharing of these resources. Furthermore, the Opinion Below also may affect groundwater rights and uses in other states, particularly those that do not recognize appropriative rights to groundwater. For both of these reasons, this Petition should be granted and the Opinion Below reversed.

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[8] The remainder is owned by the State of Arizona. *Id.*

[9] A second general stream adjudication is pending in the Little Colorado River Basin in northeastern Arizona. Although the issue addressed in this Petition arose in the Gila Adjudication, the decision of the Supreme Court of Arizona will also be binding on claimants in the Little Colorado Adjudication. The Little Colorado Basin comprises approximately 21,000 square miles in Arizona, and more than 69% of this land is in federal or Indian ownership. *See* Arizona Department of Water Resources, *Hydrology of the Little Colorado River Basin*, pp. 2-1, and 3-4 through 3-14 (1989).

A. The Opinion Below is Inconsistent with Arizona Groundwater Law and Will Arbitrarily Impact Arizona Groundwater Users.

Arizona has long adhered to a bifurcated system of water rights under which surface waters and "subflow" are subject to the doctrine of prior appropriation, while percolating groundwater is subject to the doctrine of reasonable use. *See Gila II*, 857 P.2d at 1240. The prior appropriation doctrine was recognized in the statutory law of the Territory of Arizona as early as 1864. *See Maricopa County Municipal Water Conservation Dist. v. Southwest Cotton Co.*, 4 P.2d 369, 373 (Ariz. 1931). The doctrine is currently embodied in A.R.S. § 45-141.A, which provides that "[t]he waters of all sources, flowing in streams, canyons, ravines or other natural channels, or in definite underground channels . . . and of lakes, ponds and springs on the surface, belong to the public and are subject to appropriation and beneficial use. . . . "

In contrast, "percolating" groundwater is not subject to the prior appropriation doctrine in Arizona. *See Gila II*, 857 P.2d at 1241. Instead, "underground water has been governed by the traditional common law notion that water percolating generally through the soil belongs to the overlying landowner, as limited by the doctrine of reasonable use." *Id.* at 1240. That doctrine allows the withdrawal and use of groundwater "so long as it is taken in connection with a beneficial enjoyment of the land from which it is taken. If it is diverted for the purpose of making reasonable use of the land from which it is taken, there is no liability incurred to an adjoining landowner for a resulting damage." *Bristor v. Cheatham*, 255 P.2d 173, 180 (Ariz. 1953).

Arizona's common law doctrine of reasonable use was statutorily confirmed in 1980[10] when the Arizona Legislature enacted the Groundwater Management Act and Groundwater Code. *See* A.R.S. § 45-401 *et seq.* The doctrine of reasonable use remains the law of Arizona today, except in certain areas of the state, designated "Active Management Areas," where the Legislature has imposed the extensive regulatory requirements of the Groundwater Code on all aspects of the withdrawal and use of groundwater in order to halt excessive groundwater depletion. The state has not attempted to apply the provisions of the Groundwater Code on federal reservations located within Active Management Areas.[11] However, the common law doctrine of reasonable use, as confirmed in A.R.S. § 45-453, applies in all other areas of the state, including federal reservations. Application of Arizona's doctrine of reasonable use as the rule of decision for determining the nature of federal rights to groundwater would allow all federal reservations to withdraw and use groundwater for the "beneficial enjoyment" of those reservations. This is the same right granted to all other landowners in the state, and would therefore apply "even-handedly" to both federal and non-federal groundwater users. *Wilson*, 442 U.S. at 673.

This entire body of state law was rejected by the Supreme Court of Arizona as a rule of decision for determining the nature of federal rights to groundwater. *See*

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[10] *See* A.R.S. § 45-453 (quoted in "Statutory Provisions Involved," *supra*).

[11] This case does not present the question whether the state could, under a properly crafted and administered regulatory scheme, apply essential provisions of the Groundwater Code on federal reservations.

Opinion Below, ¶ 25 (App. A20-A21). In doing so, the court asserted that "the Supreme Court [of the United States] has defined the reserved rights doctrine as an exception to Congress's deference to state water law." *Id.* The court justified this conclusion by asserting that "state law cannot be applied to destroy the federal government's right to water on its lands." *Id.* These conclusions demonstrate that the Supreme Court of Arizona misperceived both Congress' (and this Court's) views on the interrelationship between state law and federal reserved rights, and the effect that application of state law as the rule of decision would have on those federal rights.

Petitioners do not assert that state law in any way controls, or can be "applied to destroy," federal rights to groundwater. To the contrary, Petitioners assert that, *as a matter of federal law*, Arizona's doctrine of reasonable use should be applied as the rule of decision for determining the nature of federal rights to groundwater. Thus, state law does not usurp federal law on this issue. Rather, " 'state law furnishes an appropriate and convenient measure of the content of federal law.' " *Wilson*, 442 U.S. at 672, n. 19 (*quoting* Hart & Wechsler's *The Federal Courts and the Federal System*). Because the Supreme Court of Arizona failed to undertake the *Kimbell Foods* analysis, its rejection of state law in favor of a free-standing federal common law right should be reversed by this Court.

B. The Opinion Below, if Adopted as Precedent in Other States, Will Result in Conflicts with State Laws Governing Allocation and Management of Groundwater Throughout the United States.

The impact of the Opinion Below is unquestionably enormous in the State of Arizona. However, if adopted as

precedent elsewhere, its flawed reasoning may also adversely affect the citizens of many other states. Throughout the Nation, each state has developed its own rules and doctrines for determining rights to groundwater, and many have created statutory schemes for managing groundwater resources. *See* Robert E. Beck, *Waters and Water Rights*, Vol. 3, Part IV (1991). These rules, doctrines and statutory schemes vary from state to state, depending on local conditions and needs. *Id. Cf., California v. United States*, 438 U.S. 645, 648 (1978) ("The very vastness of our territory as a Nation, the different times at which it was acquired and settled, and the varying physiographic and climatic regimes which obtain in its different parts have all but necessitated the recognition of legal distinctions corresponding to these differences.")

The Opinion Below would support creation of a federal common law right to groundwater in virtually any state, and in each instance would sanction a conflict between that federal right and whatever rights exist under the laws of the state in question. Just as in Arizona, such a result would conflict both with this Court's consistent "judicial policy" favoring application of state law as the rule of decision for determining federal rights, *Kimbell Foods*, 440 U.S. at 728, and its repeated recognition of the need to address federal and non-federal claims to water in a unified, coherent system of water rights. *See, e.g., Colorado River Water Conservation Dist.* It would also be inconsistent with this Court's recognition of "the desirability of state and local management of ground water." *Sporhase v. Nebraska*, 458 U.S. 941, 952 (1982). The fact that the Opinion Below may lead to conflicts between state and federal rights in virtually any other state in the

Nation provides additional justification for reversal of that decision by this Court.

III. The Opinion Below Conflicts with a Prior Decision by the Supreme Court of Wyoming.

In rendering its decision on Issue 4, the Supreme Court of Arizona considered and rejected a prior decision on the same subject by the Supreme Court of Wyoming. That decision, *In re the General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (Wyo. 1988), held that "the reserved water right doctrine does not extend to groundwater. . . . " *Id.* at 100. In the Opinion Below, the Supreme Court of Arizona found the Wyoming court's reasoning unpersuasive and therefore rejected its holding. Opinion Below, ¶ 17 (App. A17).

This conflict between the Opinion Below and the Supreme Court of Wyoming's decision in *Big Horn*, and the implications of that conflict, were recently addressed by a judge of the Supreme Court of Montana in *Confederated Salish and Kootenai Tribes v. Clinch*, 56 Mont. St. Rep. 1356, 1999 Mont. LEXIS 346 (1999) (Rodegherio, J., dissenting). In *Clinch*, the Supreme Court of Montana considered the potential impact of a state statute on unquantified federal reserved water rights. Judge Rodegherio dissented from the majority opinion because the majority was "in effect, entering a permanent injunction without holding a factual hearing." *Id.*, 1999 Mont. LEXIS 346, at 17-18.

In addressing the conflict between Wyoming and Arizona, Judge Rodegherio stated that "[t]he majority's holding apparently precludes [the state water permitting agency] from issuing permits for groundwater use in this

fast growing area of the state even though uncertainty exists as to whether groundwater is included within the reserved rights doctrine." *Id.*, at 18-19 (citing both *Big Horn* and the Opinion Below). Judge Rodegherio also noted that "[w]ithout analysis, the majority apparently assumes that groundwater is included within the Tribes' reserved water right." *Id.* He then concluded:

> The practical consequences of the majority's decision will be significant and will deprive some Montana citizens of one of life's basic necessities, the use of water. Pervasive, unquantified Indian and non-Indian reserved water right claims exist throughout Montana. The broad sweep of the majority decision issued in a factual vacuum is not appropriate.

Id., at 19-20.

As *Clinch* demonstrates, the conflict between the Arizona and Wyoming Supreme Courts has caused "uncertainty" over the issue of reserved rights in groundwater. That uncertainty has potentially severe consequences for citizens of not only Arizona, but many other states as well. This important and unsettled federal question should be clarified by this Court.

CONCLUSION

For the foregoing reasons, the Court should grant this Petition for writ of certiorari.

Dated, Phoenix, Arizona, February 17, 2000.

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